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The Hon. Stanley Bastian

Attorney for Plaintiff

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON**

STEVEN HONKUS,

NO. 2:16-CV-00312-SAB

Plaintiff,

RESPONSIVE COUNTER MOTION IN LIMINE –

TRIMBLE NAVIGATION, LTD.

EXPERT REPORT OF MATTHEW MEDLIN

Defendant.

**Date: May 17, 2018
Time: 10:00 a.m.
Spokane**

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Time: 10:00 a.m.
Spokane**

With Oral Argument

Plaintiff Steven Honkus, through counsel, Mary Schultz of Mary Schultz Law, P.S., files this responsive countermotion in limine to defendant Trimble Navigation's motion in limine filed at *ECF 47*.

COUNTER MOTION IN LIMINE – EXPERT REPORT OF MATTHEW MEDLIN

Page 1 of 11

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I. Responsive Counter-Motion.

Trimble's motion, filed at ECF 47, and set for hearing on May 17, 2018 at 10:00 a.m., seeks to exclude Mr. Honkus' expert witnesses Dr. Stephen Diamond and Dr. Thomas Selling. Mr. Honkus will timely respond to that motion by responsive memorandum; however, as an initial part of his response, Mr. Honkus submits this responsive countermotion in keeping with the court's text order regarding the timely filing of Daubert motions. *ECF 25.* Mr. Honkus will argue *against* the exclusion of expert testimony in response to Trimble's motion. But as summarized herein, Trimble's motion, if granted, would require similar exclusion of Trimble's expert, Matthew Medlin.

II. Basis.

The SOX whistleblower statute, 18 U.S.C.A. § 1514A, prohibits Trimble, as a publically traded company, from discharging, threatening or harassing, or in any other manner discriminating against Mr. Honkus in the terms and conditions of his employment because of any lawful act done by him:

“(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or

1 1348, or any rule or regulation of the Securities and Exchange Commission, or
2 any provision of Federal law relating to fraud against shareholders,”
3

4 *18 U.S.C.A. § 1514A.*

5 To establish the elements of his claim, Mr. Honkus must therefore
6 establish his belief that what he was reporting was Trimble’s violation of either
7 a SOX statutory section, or, more generically, “any rule or regulation of the
8 Securities and Exchange Commission, or any provision of Federal law relating
9 to fraud against shareholders,” *Id.* He must also establish that this belief
10 was reasonable. In order to trigger the protections of the Act, an employee
11 must have “(1) a subjective belief that the conduct being reported violated a
12 listed law, and (2) this belief must be objectively reasonable.” *Van Asdale v.*
13 *Int'l Game Tech.*, 577 F.3d 989, 1000-01 (9th Cir. 2009), *quote source omitted*.
14

15 This “related to fraud” requirement is not something delivered to a jury
16 through a jury instruction. Indeed, an employee “need not cite a code section
17 he believes was violated” to trigger the protections of § 1514A. Instead, if the
18 employee’s statements to supervisors report conduct that definitively and
19 specifically related to shareholder fraud, then “[T]hat is all that § 1514A
20 requires.” *Van Asdale*, 577 F.3d at 997. What thus constitutes something that
21 subjectively and objectively “definitively and specifically relates to shareholder
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24 COUNTER MOTION IN LIMINE – EXPERT REPORT OF MATTHEW MEDLIN
25 Page 3 of 11

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1 “fraud” is at issue. What objectively, definitively, and specifically relates to
2 shareholder fraud within the SOX regulatory scheme is a complex issue.
3
4 This is where expertise comes in. What companies and employees should
5 know regarding what relates to shareholder fraud are generally not learned by
6 studying explicit statutes, but through company compliance procedures, and,
7 often, on the job osmosis. *Dec. of Schultz, Ex. C, Dorr Deposition at pp. 11-*
8 *12; 56* (a sales manager who came to an understanding over the course of his
9 years of employment of what regulatory controls exists as to publically
10 traded companies, and came to understand that intentionally misrepresenting
11 financial performance would violate regulatory requirements); but then
12 compare *Schultz, Ex. B, Controller Lu Shi Deposition* (Trimble’s TCL
13 business controller, who testifies that she doesn’t know whether it is “against
14 the law” to consistently and knowingly inflate forecasts).
15
16

17 Indeed, even beyond the employee’s subjective belief, the employee
18 must also show that Trimble supervisors, here, e.g., general managers,
19 executive vice presidents, business controllers, and the corporate CFO, would
20 and/or should have known that what Mr. Honkus was reporting was conduct
21 that could reasonably have been considered illegal under the regulatory
22 scheme. That is, Mr. Honkus “also must establish that ‘[t]he named person
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27 COUNTER MOTION IN LIMINE – EXPERT REPORT OF MATTHEW MEDLIN
28 Page 4 of 11


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1 knew or suspected, actually or constructively, that the employee engaged in the
2 protected activity.”” *Id. at 1002, citing to 29 C.F.R. § 1980.104(b)(1)(ii).*
3

4 Defendant Trimble has seized on this subjective/objective requirement.
5 Trimble’s defense, in part, is this:

6 “1. That Plaintiff was not engaged in protected activity under state or
7 federal law.”

8 *ECF 17, Affirmative Defenses at p.11.*
9

10 Trimble’s defense thus asserts that it is not reasonable for Mr. Honkus to
11 believe that his business unit’s inflating earnings at the business unit level was,
12 or would not be, reasonably related to shareholder fraud, (and thus protected
13 activity), and that such business behavior is not objectively related to
14 shareholder fraud. To refute that defense requires an understanding of exactly
15 what business practices *relate* to shareholder fraud, what employees should
16 reasonably believe relates to fraud, and what corporations are necessarily
17 tasked to implement as compliance procedures to prevent fraud, including what
18 business behavior “flags” or communicates such illegality. The Court will thus
19 hear about business practices, such as the requisite “internal controls” and
20 “internal audits,” both of which are business structures that ensure regulatory
21 compliance. These practices are why, e.g. executive vice presidents of sales
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27 COUNTER MOTION IN LIMINE – EXPERT REPORT OF MATTHEW MEDLIN
28 Page 5 of 11


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1 are not sent to investigate a business unit's relentless inflating of its forecasts—
2 such a process would be knowingly bogus. Internal audit, and auditors are what
3 are used within such companies to address repeated financial anomalies. But a
4 jury will not know this absent hearing of the industry regulatory compliance
5 practices.
6

7 As will be explained in Mr. Honkus' upcoming response to Trimble's
8 motion, regulatory compliance consists of business practices and internal
9 compliance processes that "relate to" shareholder fraud, and therefore the very
10 definition of protected activity is encompassed within those same practices.¹
11 Similarly, whether Trimble management would have known that Mr. Honkus'
12 reporting flagged *compliance* mandates requires the same expert testimony. It
13 is, as an example, untenable for a business controller to think that inflating
14 forecasts is just a matter of "corporate culture." *See Exhibit B, Shi.* As attested
15 by sales employee Dorr, limitations on such behavior are known by employees
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20 ¹ *See, e.g., "Corporate Compliance Programs,"* which "ensure compliance
21 with the requirements of the Sarbanes-Oxley Act... as regards the handling of
22 employee complaints." *See, e.g., Business Transactions Solutions § 223:78,*
23 *April 2018 Update, Alan S. Guterman, Part IX. Governance and*
24 *Compliance, Chapter 223. Compliance Programs, Forms.*

1 in reporting companies to implicate illegality. *See Exhibit C, Dorr.*

2 Here, Trimble executives and others could readily and self-servingly
3 claim whatever they like about Trimble's corporate compliance, as does, e.g.,
4 Ms. Shi. Trimble higher management executives could testify they had no
5 idea that a business unit inflating its forecasts would be a compliance
6 concern, and falsely assert that forecasting is objectively *not* a concern as a
7 matter of business compliance. Witnesses could mislead a jury on how
8 compliance is allegedly done within corporations or not done. Such self-
9 serving testimony from executive corporate witnesses such as a CFO or even
10 a general manager cannot be effectively shown to be false by Mr. Honkus or
11 his lawyer arguing with the witness. This is where expert testimony comes
12 in.

13 Expert evidence thus provides a necessary understanding of how public
14 companies structure, implement, and perform their compliance obligations
15 under federal securities law, and, thereby, what management would, or should,
16 understand as a matter of course and compliance upon being presented with
17 Mr. Honkus' reporting. The testimony allows Mr. Honkus to establish the
18 elements of his claim, and to show the falsity of the defenses offered by
19 Trimble.

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27 COUNTER MOTION IN LIMINE – EXPERT REPORT OF MATTHEW MEDLIN
28 Page 7 of 11

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1 Here, Trimble's own defense expert Matt Medlin discusses some of
2 these intricacies of Trimble's intended defense. Mr. Medlin proposes to testify,
3
4 e.g.:

5 1) That a reasonable lower level employee of a publically traded
6 company should allegedly know about company-wide sales forecasting:
7

8 "Opinion 1 – Mr. Honkus should have known TCL's
9 sales forecast misses were not meaningful in
10 comparison to Trimble's actual sales.

11 Opinion 2 – Mr. Honkus should have known TCL's
12 sales forecast misses were not meaningful in
13 comparison to Trimble's forward-looking sales
14 guidance.

15 Opinion 3 – Mr. Honkus should have known Trimble's
16 actual sales were, more often than not, in or above the
17 range of forward-looking sales guidance;"

18 2) That Trimble business unit TCL's "missed sales forecasts" were
19 not "material" given the entirety of the company's reporting, and that certain
20 accounting standards don't apply to Trimble:

21 "Opinion 4 - The Selling Report improperly applies
22 SAB 99, SAS 107 and AS 2105 and then
23 inappropriately ignores key elements of these
24 statements; if applicable, these three statements would
25 cause a reasonable business person to conclude that
26 the TCL sales forecast misses were not material;"

27 3) That a reasonable employee of a publically traded company
28 should know about the various SEC compliance forms, and what is and is not

1 allegedly included in such reporting:

2 “Opinion 5 - Mr. Honkus should have known TCL's
3 sales forecast was not a component of annual or
4 quarterly financial statements filed with the SEC in
5 Forms 10-K or 10-Q;” and,

6 4) That a regulatory exception known as “Safe Harbor” applies to
7 forward looking sales guidance:

8 “Opinion 6 - Mr. Honkus should have known the
9 forward-looking sales guidance provided by Trimble to
10 the public was covered by the Safe Harbor provisions of
11 the Private Securities Litigation Reform Act of 1995.”

12 *Ex. A, Medlin report, pp. 3-4, “Summary of Opinions,” ¶ 12.*

13 Such defenses require that the jury be given some understanding of why
14 these are disingenuous defenses in the field of SOX regulation.

16 **III. Conclusion.**

17 Mr. Honkus will timely submit argument on why the exclusion of expert
18 testimony under such circumstances is error. This present countermotion to
19 exclude Mr. Medlin's report and his testimony is filed only for the purpose of
20 ensuring that, were the Court to (erroneously) grant any exclusion order, then
21 Defendant's SOX expert, Matthew Medlin, must also be excluded.

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27 COUNTER MOTION IN LIMINE – EXPERT REPORT OF MATTHEW MEDLIN
28 Page 9 of 11

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2 DATED this 20th day of April, 2018.
3

4 **MARY SCHULTZ LAW, P.S.,**

5 /s/**Mary Schultz**
6

7 WSBA #14198
8 Attorney for Plaintiff
9

10 **Mary Schultz Law, P.S.**
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COUNTER MOTION IN LIMINE – EXPERT REPORT OF MATTHEW MEDLIN
Page 10 of 11

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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that she is a person of such
age and discretion as to be competent to serve papers; and that on **April 20,**
2018, the foregoing document was filed with the Clerk of the Court, using
the CM/ECF System, which will send notification of such filing to all
registered attorneys in this action.
9

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DATED this 20th day of April, 2018.
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12
/s/Mary Schultz
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Page 11 of 11

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